

The present Pre-Appeal Brief Request For Review is submitted in response to the Office Action dated November 23, 2009, and in response to the Advisory Action dated March 22, 2010. Reconsideration and allowance of this application are respectfully requested.

In the final Office Action, claims 8-11, 13, 15-23, 25, and 27-31 were rejected under 35 U.S.C. § 102(e) as being anticipated by Walker (U.S. Patent No. 7,342,973). Applicants submit that the claims are patentably distinguishable over the relied on sections of Walker.

- A. The relied on sections of Walker are not concerned with "if a received field strength value at a transmission rate exceeds a threshold value" and are not concerned with "if a received field strength value at a transmission rate does not exceed a threshold value" as set forth in the claims.**

In the Response to Arguments, the Examiner continued to assert that one of ordinary skill in the art would recognize that Walker discloses "if the received field strength value at the highest transmission rate exceeds the threshold value, initiating communication with the second wireless communication device using the unused channel of the selected frequency band as a communication channel at the highest transmission rate." However, M.P.E.P. § 2131 sets forth:

"A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2d 1051, 1053 (Fed.Cir. 1987).

(Emphasis added.) The asserted features are not found, either expressly or inherently, in the relied on sections of Walker.

For example, col. 7 lines 25-31 and 45-51 of Walker merely describe:

As explained, a multi-band communication process utilizes one or more frequency bands to transfer data from transmitter to one or more receivers. Referring to FIG. 1, it may be useful to categorize each frequency band as being in use by the

communication process, as being available, but not being used, or as being avoided because the band is *subject to excessive interference*. ...

FIG. 1 shows an example of the channel state (also referred to as the channel configuration 100), where frequency bands 1 and 3 are used by the communication process, while band 4 is available, but not used by the communication process. Band 2 has been determined to be *impaired by excessive interference* and is therefore avoided for communication purposes.

(Emphasis added.) Namely, frequency bands are avoided if the band *is subject to or impaired by excessive interference*. Such sections are not at all concerned with *if a received field strength value* at a transmission rate *exceeds a threshold value*, and such sections are not concerned with *if a received field strength value* at a transmission rate *does not exceed a threshold value*.

Moreover, col. 8 lines 17-41 of Walker discloses:

At step 210, a determination is made as to *whether there is interference present* in one of the bands used by the communication process by determining *if the intersection between the "used" set and the "interfered" set* is non-empty (used*interfered#{}). Several embodiment of the present invention are generally concerned with *detecting interference* in bands which are used during the current communication process, although *a determination about interference* in bands other than the bands currently used is equally possible, for example, to determine an alternate set of frequency bands having less interference than the current set. Thus, in one embodiment, non-used but available bands (sub-bands) are monitored to *determine if there is an interference* in such bands.

At step 210, *if interference is detected*, execution continues at step 220. Otherwise, execution continues at step 280.

At step 220, the device *determines whether the data throughput* offered by the current set of used bands *can be maintained* by exchanging the bands in the "used" set, which are *impaired by interference*, with bands from the "available" set. *If the level of throughput can be maintained*, execution continues at step 230. Otherwise, execution continues at step 260.

At step 230, the device selects a set of bands from the "available" set in order to replace the set of interfered used bands. The new "used" set is the result of *removing the "interfered" set* from the current "used" set and adding the selected bands from the "available" set (new used = used - interfered + selected). The device determines, based on the new "used" set, a data coding scheme, and continues at step 240. An

example of replacing an interfered band with an available band is illustrated in FIGS. 10-12.

(Emphasis added.) That is, the presence of interference is detected or determined, and if bands are impaired by interference, a determination is made as to whether data throughput can be maintained. The section is not concerned with carrying out any step if a received field strength value at a transmission rate exceeds a threshold value, and the section is not concerned with carrying out any step if a received field strength value at a transmission rate does not exceed a threshold value.

Further, col. 8 line 52 - col. 9 line 5 of Walker sets forth:

If, at step 220, the throughput cannot be sustained, a determination is made at step 260 as to whether the communication link could be maintained with a reduced throughput. A reduced throughput is generally the result of reducing the number of bands used for communicating data by removing the bands containing interference. Various ways known in the art can be applied to make the determination as to whether the link can be maintained with reduced throughput. For example, the communication link can be attributed with upper and lower throughput requirements. The device can then compare a reduced throughput with the lower throughput requirement.

If the communication link can be maintained with a reduced throughput, the device proceeds at step 270.

At step 270, the new "used" set results from removing the "interfered" set from the "used" set (new used=used-interfered). Also at step 270, the device determines, based on the new "used" set, a data coding scheme. Execution then proceeds at step 240. An example of removing an interfered band without a suitable replacement band is illustrated in FIGS. 13-15.

(Emphasis added.) Specifically, a determination is made as to whether data throughput can be maintained, a determination is made as to whether data throughput can be maintained with a reduced throughput, and an interfered with band is removed. This section is not concerned with carrying out any step if a received field strength value at a transmission rate exceeds a threshold value, and this section is not concerned with carrying out any step if a received field strength value at a transmission rate does not exceed a

threshold value.

Still further, col. 9 lines 55-61 of Walker teaches:

Methods of detecting an interfering signal in one or more sub-bands of a multi-band UWB communication scheme are generally based upon maintaining statistics on symbol errors and using those statistics to determine the presence of an interference, or using circuitry in the receiver to detect the presence of excess signal energy in a given sub-band.

(Emphasis added.) Namely, this section merely describes detecting excess energy to determine the presence of an interference. The relied on section of Walker is not concerned with carrying out a step if a received field strength value at a transmission rate does not exceed a threshold value.

It follows, for at least these reasons, that the relied on sections of Walker do not disclose or suggest the combination defined in claim 8 and therefore do not anticipate the claim.

Independent claims 13, 17, 18, 20, 25, 29, and 30 each call for features similar to those set out in the above excerpt of claim 8. Each of these claims is therefore distinguishable over the relied on sections of Walker for at least the reasons set out above regarding claim 8.

Claims 9-11 depend from claim 8, claims 15-16 depend from claim 13, claim 19 depends from claim 18, claims 21-24 depend from claim 20, claims 27-28 depend from claim 25, and claim 31 depends from claim 30. Therefore, each of these claims is distinguishable over the relied on sections of Walker at least for the same reasons as its parent claim.

- B. The final Office Action again ignored the absence of any support in the provisional applications filed February 20, 2002 and September 26, 2001 for the subject matter relied on in rejecting independent claims 13, 17, 18, 25, 29, and 30 so that such subject matter is not prior art.**

M.P.E.P. § 706.02(f)(1) clearly sets forth:

Example 2: Reference Publication and Patent of 35 U.S.C. 111(a) Application with a Benefit Claim to a Prior U.S. Provisional or Nonprovisional Application.

...[A] publication and patent of a 35 U.S.C. 111(a) application, which claims benefit under 35 U.S.C. 119(e) to a prior U.S. provisional application ..., would be accorded the earlier filing date as its prior art date under 35 U.S.C. 102(e), assuming the earlier-filed application has proper support for the subject matter as required by 35 U.S.C. 119(e) or 120.

(Emphasis added; see also 37 C.F.R. § 1.78(a)(4), and M.P.E.P. §§ 201.11 and 2136.03.) That is, if an application claims the benefit of a prior U.S. provisional application, subject matter set forth in the application is accorded the earlier filing date as its prior art date only if the earlier-filed application has proper support for that subject matter.

Nevertheless, the Examiner again relied on column 9 lines 12-24 of Walker in rejecting independent claims 13, 17, 18, 25, 29, and 30, and the Examiner completely ignored that the subject matter set forth in this section of Walker is not supported in any of the earlier-filed applications from which Walker claims benefit. Rather, the Office Action merely indicates the date that U.S. Provisional Application Nos. 60/359,044, 60/359,045, 60/359,046, 60/359,064, 60/359,094, 60/359,095, and 60/359,147 were filed and the date that U.S. Provisional Application No. 60/326,093 was filed.

Hence, the prior art date of the subject matter disclosed in column 9 lines 12-24 of Walker is either February 20, 2003 (the filing date of the application from which Walker issued) or September 26, 2002 (the filing dates of U.S. Application Nos. 10/255,111 and 10/255,103) whereas the priority date of the present application is April 23, 2002 which precedes the prior art date of the relied on section of Walker. The subject matter disclosed in column 9 lines 12-24 of Walker is not prior art.

Accordingly, Applicants respectfully request the withdrawal of the rejections under 35 U.S.C. § 102(e).

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